



# DETERMINING FEDERAL EMPLOYMENT SUITABILITY

*Working for America*

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT



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# PRESENTERS

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## **Gary Wahlert -- OPM**

Senior Advisor

Center for Workforce Relations & Accountability Policy

## **Mark Enterline - OPM**

Lead Suitability Specialist

Federal Investigative Services Division

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# AGENDA

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- **Basic suitability overview**
  - Coverage
  - Agency/OPM Authority
  - Relevant terms
- **Basic suitability adjudication**
  - Suitability determinations
  - Suitability actions
- **Key changes in suitability regulations**
- **Impact of Executive Order 13488**

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# WHAT IS SUITABILITY

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A person's identifiable character traits and conduct sufficient to decide whether an individual's employment or continued employment would or would not protect the integrity, or promote the efficiency of the service

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# SUITABILITY

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- Title 5, Code of Federal Regulations, part 731, (5 CFR 731)
  - Applies to covered positions
- 5 CFR 731 Suitability Actions
  - Cancellation of covered position applications and eligibilities
  - Debarment
  - Removal, if employed

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# AGENCIES HAVE AUTHORITY TO ADJUDICATE

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- Covered positions, unless there is evidence of material, intentional false statement, deception or fraud in examination or appointment, or refusal to furnish testimony
- Applicants, appointees, and employees not subject to adjudication under 5 CFR 731

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# OPM RETAINS RESPONSIBILITY TO ADJUDICATE

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- Covered position applicants, appointees, and employees with evidence of material, intentional falsification or refusal to furnish testimony
- Any case subject to adjudication under 5 CFR 731 (identified by OPM or an agency) in which a general debarment or across agency lines debarment is warranted

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# SUITABILITY VS. QUALIFICATIONS

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Qualifications determinations are based on an individual's experience, education, knowledge, skills, and abilities rather than on character traits and conduct





# SUITABILITY VS. SECURITY

SUITABILITY	SECURITY
<p><u>Objective</u> – The examination of individual personal character and conduct – would the person’s employment promote the efficiency and protect the integrity of the Service</p>	<p><u>Objective</u> – A determination regarding whether employment would constitute a risk to National Security. Influences such as foreign associates or ties are also considered in this determination –</p> <p>does the individual have personal conduct or influences that could affect or potentially affect his or her trustworthiness</p>



# **SPECIFIC SUITABILITY FACTORS**

## **5 CFR 731.202 (b)**

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### **1. Misconduct or negligence in employment**

Inability to perform & other qualifications issues are not suitability issues

### **2. Criminal or dishonest conduct**

Financial irresponsibility is only an issue if dishonesty is established

### **3. Material, intentional false statement, or deception or fraud in examination or appointment**

“Material” means capable of influencing or having a natural tendency to affect official decision. Only OPM can cite this factor in a suitability action



# **SPECIFIC SUITABILITY FACTORS**

## **5 CFR 731.202 (b)**

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### **4. Refusal to furnish testimony as required by § 5.4 of this chapter**

Factor applies only to OPM actions. Limited to testimony required by OPM, Office of Special Counsel, or Merit System Protection Board (MSPB). Does not refer to failure to complete case papers, etc.

### **5. Alcohol abuse**

Does not apply for isolated alcohol-related offenses or if there is clear evidence of substantial rehabilitation

### **6. Illegal use of narcotics, drugs, or other controlled substances**

Also does not apply if there is clear evidence of substantial rehabilitation

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# **SPECIFIC SUITABILITY FACTORS**

## **5 CFR 731.202 (b)**

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**7. Knowing and willful engagement in acts or activities designed to overthrow the U. S. government by force**

Must be an overt act. Membership in an organization, alone, is not disqualifying

**8. Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question**

**There must be a specific legal restriction to employment**

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# ORIGINS OF SUITABILITY ISSUES

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- Application or appointment forms
- Interviews/examinations
- Pre-employment inquiries
- Investigative data forms
- Personal subject interview (PRSI)
- Investigation

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# **APPLYING ADDITIONAL CONSIDERATIONS 5 CFR 731.202(c)**

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## **1. Nature of the position**

The more authority, responsibility, sensitivity, and public trust associated with the position, the higher the risks involved and the more potential adverse impact there is to the efficiency and integrity of the service; thus the misconduct becomes more serious as a potentially disqualifying issue. However, certain kinds of conduct may result in disqualification regardless of the position

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# NATURE OF THE POSITION

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- Law Enforcement positions - sale of narcotics
- Fiduciary positions - embezzlement
- Motor Vehicle Operator - habitual traffic offender
- Computer Security Manager - using company computer to access porn sites
- Staffing Specialist - prohibited personnel practices

**NOTE: LIST IS NOT ALL-INCLUSIVE**

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# APPLYING ADDITIONAL CONSIDERATIONS

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## 2. Nature and seriousness of the conduct

The more serious the conduct, the greater the potential for disqualification

## 3. Circumstances surrounding the conduct

Full facts and circumstances are essential to insure justice to the person and to protect the interests of the Government



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# APPLYING ADDITIONAL CONSIDERATIONS

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## 4. Recency of the conduct

The more recent the conduct is, the greater the potential for disqualification

## 5. Age of person at time of conduct

Offenses committed as a minor are treated as less serious than those committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous

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# APPLYING ADDITIONAL CONSIDERATIONS

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## 6. Contributing societal conditions

Economic and cultural conditions might be a mitigating factor if the conditions are now removed.

Generally considered in cases with relatively minor issues

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# APPLYING ADDITIONAL CONSIDERATIONS

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## 7. Absence or presence of rehabilitation or

efforts toward rehabilitation

- Time elapsed since conduct last occurred (no set time frame - must be considered in tandem with other factors)
- Results of treatment/counseling- prognosis and past history of treatment
- Other aspects of the individual's life, such as stable employment record, positive changes in personal life, etc.

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# NOTICE OF PROPOSED ACTION

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- Gives reasonable notice to subject in writing, stating specific reasons
- Notifies subject of right to “materials relied upon”
- Informs respondent of time limits for response and right to respond in writing
- Retains subject in pay status during response time, if employed
- Advises subject of right to representation

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# RESPONDENT'S ANSWER

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Respondent has the right to answer charges in writing and furnish documentation and/or affidavits in support of response

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# DECISION

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- Issue a written, dated decision and inform respondent of reasons for decision
- Give appeal rights to MSPB
- Remove within 5 workdays following the date of the decision

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# AGENCY DEBARMENT ACTION

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- 5 CFR 731.205 gives agencies authority to debar from all covered positions within the agency, or only from specific covered positions within the agency
- Agency takes action when case does not meet guidelines for referral to OPM (OPM can bar from all covered positions)
- Agency must enforce debarment

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# WEIGHT OF EVIDENCE

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To meet the standard of “Preponderant,” the evidence in a suitability case must be such that a reasonable person would accept it as sufficient to find a contested fact more true than untrue

vs.

Criminal standard - “beyond a reasonable doubt”



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# WEIGHT OF EVIDENCE

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The weight of evidence and credibility of sources is carefully evaluated at MSPB

- Admissions on forms, alone, are not sufficient
- Minimum evidence - signed statement by subject outlining details of conduct (witnessed and/or notarized)
- Disputed issues - obtain records, signed statements, multiple source testimonies, or call witnesses for the MSPB hearing

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# AGENCY OPTIONS WHEN MORE INFORMATION IS NEEDED

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- Contact the subject for information
  - Obtain signed, witnessed statement
- Contact sources directly
  - Court, probation officer, employers, etc.
  - Ensure sources are advised of Privacy Act Rights
- Request pre-employment investigation or Reimbursable Suitability/Security Check (RSI) from OPM

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QUESTIONS?



# CONTACT INFORMATION

For more information, visit the web at

[www.opm.gov](http://www.opm.gov)

[www.opm.gov/extra/investigate](http://www.opm.gov/extra/investigate)

[www.grad.usda.gov](http://www.grad.usda.gov)

**Call or write OPM's**

**Federal Investigative Services Division**

Agency Liaison Group

(703) 603-0442

Suitability Adjudications Branch

(724) 794-5612

OPM-FISD-AG-SAB

P.O. Box 618

1137 Branchton Road

Boyers, PA 16018-0618

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# KEY CHANGES to 5 CFR 731

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- Coverage
- Agency/OPM Authorities
- Definitions
- Investigations
- Suitability Factors
- Suitability Adjudication Process
- Reciprocity
- Appeals
- Reporting



# COVERAGE

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## COVERED

**Excepted service positions that can be noncompetitively converted to the competitive service**

- Examples include Presidential Management Fellows, Federal Career Interns, and VRA Appointees

## NOT COVERED

**Objections to eligibles or pass-overs of preference eligibles**

- 5 CFR 332 decisions distinct from 5 CFR 731 decisions
- Not appealable to the Merit Systems Protection Board

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# **AGENCY/OPM AUTHORITIES**

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- **Agencies can begin to determine suitability at any time in the employment process**
- **Agency debarment authority extended to 3 years**
- **Additional debarment periods**
- **Agency authority to take action under appropriate procedures without pre-approval from OPM**
- **Agency authority subject to revocation by OPM**

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# DEFINITIONS

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- **Suitability determinations**
- **Suitability actions**
- **Material statements**
- **Core duties of position**
- **Criteria “equivalent” to suitability criteria**



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# Investigations

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## **Investigations not permitted when:**

- Appointment, conversion, or transfer of individual with 1 year of continuous service and determined suitable or fit under criteria equivalent to 5 CFR 731 criteria

## **Investigation permitted when:**

- Higher level of investigation required
- New information questions suitability of individual

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# Suitability Factors

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- **Factor on alcohol abuse modified to require analysis of whether there is evidence of substantial rehabilitation**
  - Parallel with factor on drug use.
- **Agencies/OPM are required to consider the “presence or absence” of one or more factors in adjudicating a case**
- **Agencies/OPM exercise “sole discretion” in deciding whether “additional considerations” are pertinent to an individual case**

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# Suitability Adjudication Process

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- **Agency/OPM suitability determinations**
- **Agency/OPM suitability actions**
  - Agency process parallel with OPM process
  - Right to representation
  - No oral reply
  - Appeal rights



# Reciprocity

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- **When reciprocity applies**

- Gaining agency uses criteria equivalent
- Prior fitness/suitability determination based on equivalent criteria
- No break in service

- **When reciprocity does not apply**

- New investigation is required
- New information calling fitness into question
- Conduct incompatible with core duties of position

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# Appeals

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- **MSPB must make finding on all charges and specifications**
- **Agency choice of authority for taking action determines MSPB jurisdiction**
- **Agency must hold in abeyance a decision on remand from MSPB**

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# Reporting

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- **Agencies must report all actions taken as a result of an OPM suitability investigation**
- **Agencies must report to OPM when they believe a government-wide debarment might be appropriate in a specific case**
- **Agencies must provide information about the level and result of each background investigation, suitability determination, and suitability action taken to OPM.**

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# **E.O. 13488**

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- **What it does**
- **What it doesn't do**
- **OPM guidance/regulations**
- **Controlling dates**

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# 5 CFR 731 RULE CHANGES

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- **72 FR 2203 (2007) – Proposed Rule**
- **73 FR 20149 (2008) – Final Rule**
- **73 FR 35358 (2008) – Proposed Rule**
- **73 FR 66489 (2008) – Final Rule**
- **<http://ecfr.gpoaccess.gov> – Consolidated Rule**



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# CONTACT INFORMATION

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